IN THE HIGH COURT OF BOMBAY AT GOA
****

WRIT PETITION NO. 446 OF 1996

Smt. Usha Bhikaji Prabhu
Velguenkar, r/o Dabal,
Sanguem, Goa, represented by
her constituted attorney Shri
Rosario F. Barreto, c/o
Adv. U. Menezes Gama,
Melquiedes Bldg., IIIrd Floor,
Fr. Joseph Vaz Road,
Vasco da Gama, Goa. ... Petitioner

Versus

1. State of Goa, represented
by the Chief Secretary,
with office at Secretariat,
Panaji,

2. Dy. Collector at Quepem, South
Goa, with office at Quepem, and

3. Administrative Tribunal,
Goa, Daman & Diu, Panaji. ... Respondents.

Shri M. S. Usgaokar, Senior Advocate with Shri Sudesh Usgaokar, advocate for the petitioner.

Shri H. R. Bharne, Government Advocate for the State.

CORAM : F. I. REBELLO, J.

DATE : 25th July 2003

ORAL JUDGMENT

. Respondents had granted to one Saulo Laxman G. Gaonkar, land known as "Mundiacattem - Bori Collem - Mol" admeasuring 24,488 sq. mts. This grant was made under the provisions of Decree No.3602 dated November, 24, 1917, as a provisional grant under Article 31 read with Article 34 of the said Decree. It is the case of the petitioner that the grantees redeemed the land under cultivation within ten years from the grant i.e. 1941 by paying the necessary quit rent . However, the grantee though entitled to get the title of aforamento, it remained without being obtained. The Government had finally approved the grant of title of aforamento as approved by the Lt. Governor on September 10, 1970 and conveyed by letter dated 26.9.70.

The grantee deposited the amount as called upon and the grantee was issued title dated on 13th September, 1971. The Collector issued instructions to the Taluka Revenue Office to cancel previous inscription and make a fresh inscription in the concerned book as the land in question granted previously on provisional basis under Alvara (Sanad) No.1117 dated 4th June, 1941 had been granted on permanent basis. It is the case of the petitioner that the successors of the assignee paid twenty instalments of foro and acquired dominion of the soil. Payment was admitted as per the certificate of the Government dated 5th August, 1987. It is the case of the petitioner that as per Article 75 of the Decree, the grantee is entitled to transfer and mortgage his possessory domain. By deed dated 30th December, 1985, the successors of Saulo Laxman Gaonkar sold the lands to the petitioner. The record of rights entry was accordingly made in the name of the petitioner as occupant.

2. The petitioner made an application dated 22nd March, 1990 under Section 32 of the Land Revenue Code for conversion of the land for non-agriculture (residential) purposes to the respondent no.2. Respondent no.2 after considerable delay, by its letter dated 5th October, 1990 sought clarification from the petitioner stating that the - petitioner has no title to the land as title documents produced show that the land was originally granted to Saulo Laxman Gaonkar for cultivation on emphyteusis title no.COL/1/1971 dated 13th September, 1971 and as per condition no. 4 of the same the original assignee had not taken prior permission from the Government for transferring land to the petitioner. The petitioner replied by his letter of 15th November, 1990 giving clarification sought

by the respondent no.2 and pointing out that no prior permission was required as the grant/title no. 1117 had been made to the assignee under Decree Law no. 3602 dated 1st September, 1917 and as per Article 35 of the same, after the period of 10 years of provisional grant, when the successor of the assignee paid the quit rent and redeemed the foro, the successor of assignee acquired dominion of the land and as such there was no obligation towards the Government, the assignee becoming absolute owner under the law. It is the petitioner's case that after this clarification, respondent no.2 passed an order which was the subject of an appeal. The petitioner further averred that respondent no.2 failed to pass the decision within sixty days resulting in deemed refusal. The petitioner preferred an appeal to the Revenue Secretary and the Revenue Secretary by his Order dated 8th August, 1990, directed the Collector to dispose of the case. On remand the application was dismissed by respondent no.3 by Order dated 13th March,1991. An appeal was preferred before the third respondent, being the Land Revenue Appeal No.10/92 which came to be dismissed by Order dated 24th September, 1996. Hence the present petition.

3. On behalf of the respondent State, the Under Secretary (Revenue) has filed an affidavit. It is pointed out therein that the land is admittedly situate in village in Codil in Sanguem Taluka and therefore Article 35 of the Decree of 3602 is not attracted. It is set out that the provision is encompassed under Sub-Chapter I of Chapter 4 which deals with provisional assignment relating to distribution of land to the natives of Sattari, Embarbacem, Astraga and Cotigaun Taraph of Canacona. It is further pointed out that Section 201 of the Goa Land Revenue Code,

1968, has been enforced in the Union Territory of Goa, Daman and Diu with effect from lst March, 1971. Referring to the Assignment Document, it is set out that though it is mentioned that the assignment is subject to the provisions of Decree no.3602 dated 24th November, 1917, it is also provided that the same is also subject to any law for the time being in force. Reference is made to Clause (1) of the aforesaid deed. It is then pointed out that there is no provision in the Land Revenue Code for transfer of land without permission. The Land Revenue Code does not provide for any ownership rights, instead it contemplates only occupational rights. There is no right of remission of foro and no concept of direito domino. The grant of land could therefore be only in accordance with the existing law and more specifically in accordance with the Goa, Daman and Diu Land Revenue Code (Disposal of Government Lands) Rules, 1971. It is also submitted that even if grant is accepted in view of the provisions of Rule 3 of the Goa, Daman and Diu Land Revenue (Disposal of Government Lands) Rules, 1971, it would override Article 72(3) of the Decree No.3602 and proprietary rights continue with he Government. No prior permission of the Government was taken for sale, which itself is a violation of Clause 4 of the conditions in the Deed of assignment. The Deed of Sale is null and void and is of no consequence. That by itself would entitle the Government to terminate the assignment as stipulated in the document of grant itself. It is also pointed out that under Section 30 of the Land Revenue Code, 1968, no land used for agricultural purpose can be used for non-agricultural purpose and no land assessed for one non-agricultural purpose can be used for any other non-agricultural purpose, in relaxation of the conditions imposed at the time of grant for non-agricultural purpose,

except with the permission of the Collector, in accordance with Section 32 of the Land Revenue Code, 1968. On record is also placed a document showing that under Barcem is included the village Codli Or Codali.

4. At the hearing of the petition, on behalf of the petitioner, the following points were formulated for consideration:-

. (i) If the original grant was made provisionally in terms of the provisions of Decree No.3602, does it confer a right on the grantee to get permanent grant and acquire dominion over the soil, by getting the title of aforamento on payment of quit rent,(20 instalments of foro in lump sum,) and if so, whether any conditions which restrict the ownership rights of grantee under the title would be il-legal.

. (ii) Whether in case of grant of of aforamento of land pursuant to the original grant under Decree 3602, the aforamento is governed by the provisions of Decree 3602, or by the Land Revenue Code; and

. (iii) Whether it was open to the Collector under Section 32 of the Land Revenue Code, to reject the application for reasons disclosed in the Order?

5. In support of the contentions on behalf of the petitioner, their learned counsel has basically relied on the provisions of Decree No.3602 dated 24th November, 1917. It is contended that what was granted to the petitioner was an emphyteusis of land and not a mere lease. The same was redeemed by payment of foro. Once that was the case, it

was open to the original grantee to transfer the land, which has been done and in these circumstances, the petitioner being the owner of the land, the bar under Section 32 of the Land Revenue Code, would not be attracted. Reliance was placed on various dictionary meanings as also the judgment of the learned Judge of this Court in Special Civil Application (Writ Petition) No.86/B/80 decided on 15th July, 1983.

. On the other hand on behalf of the respondents it is contended that the assignment in favour of Saulo Laxman Gaonkar was done after the Land Revenue Code had come into force and was made with the condition that the assignee was not to transferr the rights without the prior permission of the Government. This condition was accepted by the predecessor-in-title of the petitioner and once that be the case, it is not open to the petitioner to contend that respondent no.2 could not have rejected the application for conversion based on the said clause.

6. We may now answer the contentions. The first title document in favour of the predecessor-in-title of the petitioner is dated 21st May, 1941. The land is situated in village Codli of Taluka of Sanguem. This is not denied. The Order itself states that the grant is provisional and approved under Decree 3602 of 24th November, 1917. The Order then refers to Article 34 and sets out that the duration of the provisional grant shall be of ten years during which the grantee shall not be able to sell, mortgage, or by way of any other mode transfer the property of the land that may be granted to him provisionally, which as the property of the State cannot be subject to any charge, except of the fruits plucked or hanging. Article 35 thereafter sets out on expiry of ten years of

provisional grant, the grantee or his heirs shall, for all legal purposes be considered as grantee on emphyteuta of the land granted as soon as he obtains the respective title of the grant in terms of the present diploma. In other words, the document itself would show that what was granted to the petitioner was the provisional grant and he would be considered as a grantee on emphyteusis as soon as he obtained respective title of the grant in terms of the diploma. Article 36 provides as to when the land given on provisional grant shall revert to the dominium of the State.

. Decree no. 363602 dated 24th November, 1917, is divided into various chapters. Chapter III deals with the assignments in general. Chapter IV deals with provisional assignments. Under Article 37 it is set out that permanent assignment can be made in accordance with the Decree to the villages of Sattari, Embarbacem, Astragar and Cotigaun Taraph of Canacona provided that they subject themselves to the conditions prescribed therein for the assignments made to persons strange to the said locality. There are various other provisions dealing with the provisional assignments. Chapter VI provides for grant of Government lands on emphyteusis. Section 72 lays down the conditions under which it can be granted. Section 75 provides that the emphyteuta can transfer and mortgage his possessory domain or encumber it with any charges or easements, on condition, however, that the acquirer shall become by means of the execution, as regards the lands on emphyteusis, invested with the same rights and obligations as those of the assignee towards the State.

. The document of 21st May, 1941, was not a contract of emphyteusis but a provisional grant which could be given

under Article 35 .In other words, something further had to be done before the land could be given on emphyteusis. Apart from that, Chapter III provides for assignment in general, whereas Chapter IV deals only with provisional assignments. My attention was drawn to the meaning of the expressions "dominium directum" and "dominion utile" from Black Laws Dictionary, Sixth Edition, which expressions under feudal law are defined as being the mode or system of holding lands or dominions in subordination to some superior which in feudal ages, was the leading characteristic of real property. It then sets out that tenure is direct result of feudalism which separated "dominium directum" the (dominion of the soil) which is placed mediately or immediately in the crown, from the "dominion utile" (the possessory title), the right to use and profits in the soil, designated by the term "seisin", which is the highest interest a subject can acquire. "Tenure" has been defined as a right, term or mode of holding or occupying. The word "emphyteusis" in Black's Law Dictionary, Sixth Edition, has been explained in Roman and civil law as a contract by which a landed estate was leased to a tenant either in perpetuity or for a long term of years, upon the reservation of an annual rent or canon and upon the condition that the lessee should improve the property, by building, cultivating, or otherwise, and with a right in the lessee to alien the estate at pleasure or pass it to his heirs by descent, and free from any revocation, re-entry, or claim of forfeiture on the part of the grantor, except for non-payment of the rent. The right granted by such a contract (jus emphyteuticum, or emphyteuticarium) has been explained as the real right by which a person is entitled to enjoy another's estate as if it were his own, and to dispose of its substance as far as

can be done without deteriorating it.

7. Therefore, it will have to be firstly considered, whether what was granted to the predecessor-in-title of the petitioner was land on emphyteusis. Reference has been made to the provisional grant which is covered by Chapter IV of the Decree, and the various clauses thereto. Reference has also been made to Chapter V and the provisions therein, whereby the assignee under Section 72(3) could acquire a direct dominion on payment of upto 20 times the amount of annual ground rent (foro), when & half of the assigned land is cultivated, and the cost of trees belonging to the State (Government) existing in the land is paid according to the prices fixed in the schedules in force at that time. Chapter VIII provides for the grant on emphyteusis of uncultivated land situated in Sattari, Embarbacem, Astragar and Cotigaun Taraph of Canacona. The procedure followed for assignment of these emphyteusis shall be that as provided in Chapter IV. In other words, lands in these villages could either by given on provisional assignment as set out in Chapter IV, or on emphyteusis, as set out in Chapter VIII. The Decree also provided for leases in Chapter X, which we are really not concerned. Therefore, from the original document in favour of the original assignee it can be seen we find that what was granted to the petitioner was a provisional assignment and not land on emphyteusis. That position remained until the coming into force of the Land Revenue Code, 1968. Section 201 of the Land Revenue Code is the Section pertaining to repeal. It repealed Decree no.3602 dated 24th November, 1917, subject to the saving clauses therein. Once the Land Revenue Code came into force all grant of land was subject to the provisions of the Land revenue Code

and there could be no vested right in a party to contend that he should be granted land on emphyteusis in terms of a Decree which was repealed. In the judgment of this Court relied upon on behalf of the petitioners in Govind P. Raiturcar vs. Union of India & Ors. (supra) it appears that the land therein was granted on emphyteusis. It is under these circumstances that the Court held that once the land was granted on emphyteusis, there would be no question of revoking the grant as under Decree no.3602, considering the provisions of Article 73(3), the ownership of the granted lands had been fully vested in the petitioner therein and it was open to such a person to transfer the same. That judgment clearly would not be applicable on the facts of the present case as what was granted herein was only a provisional assignment. Once that be the case, the assignment could only have been under the provisions of the Land Revenue Code. It is true that a decision to grant was taken on 26th September, 1970, whereas the Land Revenue Code came into force on 6th January, 1971 and some other provisions came in force with effect from lst March, 1971. However, what is material is that the agreement was entered into on 13th September, 1971 in terms of Article 299 of the Constitution of India and that would be the date on which it can be said that the assignment has been done by the Government in favour of the predecessor-in-title of the respondent. The grant could not be under Decree No. 3602 as it was no longer in force. The grant could be only in terms of the law in force, which was the Land Revenue Code. The grant was given with a stipulation which was accepted by the grantee. The condition of no. transfer without permission could be included considering the provision of the Land Revenue Code.Once that be the case, the first two questions will have to be answered against the petitioner

herein.

8. The next question as was contended is that once an application is made under Section 32,of Land Revenue Code, The Collector could not examine whether the land was correctly transferred and that question was wholly immaterial or extraneous for consideration of an application for change of user.Permission can be granted on an application by an occupant of land or by a tenant. Under Section 24 of the Land Revenue Code "occupant" means holder in actual possession of land other than a tenant or Government lessee. It is, therefore clear that a person holding land from the Government would not be an occupant for the purpose of the Land Revenue Code or even for the purpose of Section 32. In terms of Section 32, therefore, the respondent no.2 considering the said provisions and the clauses in the Deed acted within jurisdiction in rejecting the application. Once that be the case, in my opinion, no fault can be found with the orders passed by respondent nos.2 and 3.

. On behalf of the respondents their learned counsel relied on the judgment in the case of Union of India vs. Piedade Fernandes, AIR 1989 Bom.81. No doubt in that case various provisions of Decree No.3602 in respect of land granted on aforamento were considered. However, that was in the context of acquisition of land. We are really not concerned with that aspect of the matter. The point in issue here however was not directly in issue in that petition. What was in issue in that case was the right of the State to expropriate the land without paying any compensation when needed for public purpose.

9. In the light of that Rule discharged. In the circumstances of the case there shall be no order as to costs.

(F.I.REBELLO,J.)